Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

SYBILLE G. WOOTEN,

Petitioner,

vs.

CAROL CAMPBELL, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court ofAppeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause imposes upon state officials an affirmative duty to protect or provide reasonable safety to a child in the officials' legal and physical custody, who is physically placed by the officials in a dangerous situation.

2. Whether the Due Process Clause imposes upon state officials an affirmative duty to protect or provide reasonable safety to a child in the officials' legal custody who has been placed by them in foster care.

3. Whether it was "clearly established" in 1991 that a state agency has an affirmative duty to protect or provide reasonable safety to a child in the agency's legal and physical custody, who is physically placed by an agency employee in a dangerous situation.

4. Whether it was "clearly established" in 1991 that a state agency has an affirmative duty to provide reasonable safety from harm to a child in the agency's legal custody, when the child has been placed by the agency in a foster home.

5. Whether a circuit court panel may resolve a Due Process claim where there are disputed issues of material fact and no substantive discovery has been permitted.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Sybille G. Wooten

Carol Campbell

Nancy P. Gilbert

Douglas G. Greenwell

Ruth Y. Hicks

Patricia Keating

Johnny V. Lewallen

Gail Ormsby

Betty Wrights-Robinson

Estate of Michael Wooten, Third Party Defendant

Joanne Gaynor

Gerald V. Gouge

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of All Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statute Involved	1
Statement of the Case	2
A. Parties	2
B. Factual Background	2
C. Proceedings Below	11
Reasons for Granting the Writ	12
I. "Whether the State has a constitutional obligation to protect a child in its physical and legal custody, whom it subjects to a state created or enhanced danger" is an important question which has not been, but must be settled by the Supreme Court. . .	13

Contents

Page

II. "Whether the State has a constitutional obligation to protect a child in its custody, who is placed by the State in foster care" is an important question which has not been, but should be settled by the Supreme Court. 15

III. The circuit court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. 17

A. The Circuit Court Bases Its Decision Upon Factual Error. 17

B. The Circuit Court Resolves Disputed Issues of Material Fact Without Permitting Petitioner to Conduct Any Substantive Discovery. 18

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1784 (1990) 14

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) 12, 13, 14, 15, 16, 17

Contents

	Page
Doe v. New York City Department of Social Services, 649 F.2d (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983) .	16
Estelle v. Gamble, 429 U.S. 97 (1976)	15
Griffin v. Johnson, 899 F.2d 1427 (5th Cir. 1990)	16
Jones v. Phyfer, 761 F.2d 642 (11th Cir. 1985)	14
K.H. Through Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990)	16
Lipscomb v. Simmons, 884 F.2d 1242 (9th Cir. 1989)	16
Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990)	16
Revere v. Massachusetts General Hosp., 463 U.S. 239 (1983)	15
Taylor by and Through Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989)	16, 19
Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990)	14
Wooten v. Campbell, 49 F.3d 696 (11th Cir. 1995)	1, 18
Youngberg v. Romeo, 475 U.S. 307 (1982)	15

Contents

Page

Yvonne L. by and Through Lewis v. New Mexico Department of Human Services, 959 F.2d 883 (10th Cir. 1992) 16

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 11

28 U.S.C. § 1341 11

42 U.S.C. § 1983 .....1, 2, 5, 11, 12, 17, 18, 19

Other Authority Cited:

Division of Family and Children Services Manual, Foster Care Section, §§ 1001.1, 1032 7

United States Constitution Cited:

Fourteenth Amendment .....i, 1, 11, 14, 16, 18

APPENDIX

Appendix A — Order Denying Rehearing of the United States Court of Appeals for the Eleventh Circuit Filed May 31, 1995 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Eleventh Circuit Dated April 6, 1995 ..... 4a

Contents

Page

Appendix C — Order of the United States District Court, Northern District of Georgia, Atlanta Division Filed August 23, 1993 ..... 16a

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, 49 F.3d 696 (11th Cir. 1995), reproduced herein as Appendix B; and the opinion of the district court, unreported, reproduced herein as Appendix C.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the 11th Circuit was entered on April 6, 1995. A Petition For Rehearing filed by petitioner was denied on May 31, 1995, and the Order is produced herein as Appendix C. This Court has jurisdiction to issue the requested Writ of Certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const., amend. XIV, Section 1.

Title 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Parties

Petitioner Sybille G. Wooten is the natural mother of Daniel M. Wooten, the deceased child. At all times material hereto, Petitioner was married to Michael D. Wooten, the natural father of Daniel. Respondents Hicks, Gaynor, Gilbert, Campbell and Keating are caseworkers at the Forsyth County Department of Family and Children Services. Respondents Gouge, Greenwell, Lewallen, Wrights-Robinson and Ormsby are employees of the State and Regional levels of the Georgia Department of Human Resources.

B. Factual Background

This is a Title 42 U.S.C. § 1983 civil action seeking recovery for the abduction and subsequent murder of Daniel Wooten, a four-year-old boy, which occurred after a caseworker placed Daniel with his father, Michael Wooten, for an "unsupervised" visit. On the day of the abduction, the Georgia Department of Human Resources ("DHR") and Forsyth County Department of Family and Children Services ("DFACS"), through its agents, *alone* possessed custody of Daniel.

On the day Daniel was released for the fatal "unsupervised" visit, DHR and DFACS were aware of the following unresolved allegations pending against Mr. Wooten: he had physically

abused Daniel; he had sexually abused Daniel; he had exposed Daniel to sexually explicit materials; he had slept with Daniel in a locked room for two months; he had taken nude photos of Daniel against his will; he had raped Petitioner; he had mentally tortured Petitioner; he had exposed himself and made obscene phone calls to his neighbor; his neighbor had witnessed Mr. Wooten's violent behavior, and Mr. Wooten was an alcoholic. DHR and DFACS also knew Daniel had been abducted by Mr. Wooten *only seven months earlier.*

Daniel's DHR and DFACS case files show that several days before the second abduction, and after the only overnight visit between Mr. Wooten and Daniel, Respondents were aware Daniel's behavior in therapy had become more aggressive. Daniel's case file indicates he stated "he needed his guns and knives if he were going to stay with dad at night and that he did not like the long trip to grandma's house because he was afraid that he was not coming back to mom." DFACS' concern over Daniel's abrupt change in behavior caused the caseworkers to discontinue any further overnight visits between Daniel and Mr. Wooten; however, the January 31, 1991 visit was permitted to take place without any protective supervision for Daniel.

The events leading up to Daniel's second abduction and subsequent murder by Mr. Wooten are as follows. On June 26, 1990, after Mr. Wooten had attempted to strangle Petitioner the Saturday before, Petitioner received an *ex parte* protective order from the Superior Court of Forsyth County, Georgia, giving her custody of Daniel and enjoining Mr. Wooten from coming within 500 yards of either Petitioner or Daniel. Shortly thereafter, Mr. Wooten abducted Daniel from day care and a month later Mr. Wooten was arrested for felony interference with custody. Upon notice from the Forsyth County Sheriff's Office, DFACS became involved in Daniel's case.

Upon arrival at the scene, DFACS learned of allegations of child abuse made by both Mr. Wooten and Petitioner. However, after evaluating the veracity of the allegations, DFACS decided it would be appropriate to temporarily place Daniel with Petitioner, provided she and Daniel took refuge in a safe place. According to caseworker Gaynor's contact sheet, "If the things about him [Mr. Wooten] are true, then both mother and son would be in danger should he make an attempt to see them."

In their decision to temporarily place Daniel with Petitioner, Daniel's DFACS case file indicates the caseworkers relied heavily upon the opinions of Dr. Frank S. Pittman, III and Nancy Aldridge, both therapists who were familiar with the Wootens' situation.

Dr. Pittman told caseworker Gaynor he felt Daniel would be safe with his mother, and he provided an affidavit stating Petitioner was a "stable, sane, conscientious, perfectly and completely capable person, who was capable of functioning as a good parent." He also said Mr. Wooten was an alcoholic and cited several examples where he mentally tortured his wife; *i.e.*, he [Mr. Wooten] would not let Petitioner have a key to their house, he taped her telephone conversations and would not tell her where he worked.

Caseworker Gaynor learned of Dr. Pittman's concern over the sleeping arrangements between Mr. Wooten and Daniel; Mr. Wooten had been sleeping in a locked bedroom with Daniel for about two months. Ms. Aldridge also disclosed to caseworker Gaynor her suspicions of sexual abuse by Mr. Wooten.

Caseworker Gaynor spoke with Jan Woodcock, the Wootens' neighbor, who stated she had witnessed Mr. Wooten's anger and regular drunkenness firsthand, and had experienced him leaving obscene messages on her answering machine. Ms.

Woodcock recalled an incident when Mr. Wooten exposed his genitals to her after coming into her home drunk and uninvited. She expressed to caseworker Gaynor her unwillingness to become involved in the Wooten matter because of possible retaliation from Mr. Wooten; "she did not want Mr. Wooten to hurt her."

In early August 1990, several days after DFACS became involved with Daniel, the Forsyth County Juvenile Court appointed a guardian *ad litem* for Daniel and awarded physical and legal custody of Daniel to DHR acting through DFACS. DHR and DFACS were also granted the authority to place Daniel. Custody and placement authority was granted for eighteen months and the order provided for reasonable visitation between Daniel and his parents, or if Daniel was placed with one of his parents, between the non-custodial parent and Daniel. The order specifically states the visitation was to be "under the control, direction and *supervision* of DHR and DFACS" (emphasis supplied by Petitioner). After Petitioner filed her § 1983 actions, counsel for Respondents obtained an affidavit from the Juvenile Court judge who now interprets his order as leaving the time, place and manner of visitation to the decision of DFACS.

After obtaining custody of Daniel, DFACS investigated and concluded Petitioner was an appropriate placement resource and elected to place Daniel with Petitioner. In an affidavit prepared to support caseworker Hicks' Motion to Dismiss and/or Summary Judgment, Hicks characterizes this placement as "foster care placement."

Instances from the DHR and DFACS case files which demonstrate Daniel's foster care placement, and which evidence Respondents' control and dominion over Daniel and Petitioner, include, but are not limited to, the following:

(1) On a July 31, 1990 contact sheet, Form 452, after the Juvenile Court awarded custody and placement authority of Daniel to DHR and DFACS, caseworker Gaynor states, "Talked with Ms. Wooten re: placement. The Department is going to let placement remain with her. *There will be restrictions and things that she will need to abide by.*" (emphasis supplied by Petitioner);

(2) On an August 28, 1990 contact sheet, Form 452, caseworker Gaynor reports she explained to Michael Wooten in a telephone conversation that it is not their procedure to check on Daniel daily, that Daniel was in day care, and that the day care center will report *to DFACS* if there are any problems with Daniel;

(3) On a September 7, 1990 contact sheet, Form 452, caseworker Gilbert reports she explained to Michael Wooten during an office meeting that DFACS had Daniel in a day care center and that *they had asked the day care center to notify DFACS* of any suspicious bruising on Daniel or behavior of the mother;

(4) On a September 12, 1990 contact sheet, Form 452, caseworker Gilbert reports she contacted Daniel's day care center and reminded the director to notify *DFACS* immediately should any unusual behavior, marks, etc., become apparent;

(5) On a September 19, 1990 contact sheet, Form 452, caseworker Gaynor reports she visited Ms. Wooten's home "*for the purpose of evaluating Daniel with his mother, the conditions of the home and any other matter which may be deemed important.*" (emphasis supplied by Petitioner);

(6) On a September 19, 1990 contact sheet, Form 452,

caseworker Gaynor reports that she inspected Daniel's ears as a result of a report she had gotten;

(7) On a September 19, 1990 contact sheet, Form 452, caseworker Gaynor reports she discussed the medical attention of Daniel with Ms. Wooten;

(8) A DHR FOSTER CHILD INFORMATION SHEET was prepared for Daniel;

(9) Daniel's DHR FOSTER CHILD INFORMATION SHEET, states he is with his mother and is to "remain in foster care until it is determined he is not at risk.";

(10) On January 22, 1991, a little over a week before Daniel's second abduction, in a letter authored by caseworker Hicks to Daniel's guardian *ad litem*, Hicks refers to Daniel as being in "foster care";

(11) On March 29, 1991, caseworker Campbell submitted a written summary of Daniel's case and the events leading to his death to Linda Darter, Director of Social Services, "in compliance with § 1032 of the Foster Care Manual";

(12) In a final case summary of Daniel Wooten prepared by caseworker Campbell, she reports it is DFACS' belief that the policy of the Division of Family and Children Services, Foster Care Section, § 1001.1 was being followed in Daniel's case.

After custody was obtained by DHR and DFACS, DFACS permitted Mr. Wooten to visit Daniel every other week at their offices *under the supervision* of the caseworkers. During this period, Mr. Wooten made repeated and aggressive contacts with

DHR and DFACS on the local, regional and state levels demanding "unsupervised" visits. Respondent Ormsby, a regional level employee of DHR, described Mr. Wooten as being very difficult to work with.

On November 19, 1990, Mr. Wooten contacted Respondent Gouge, Chief of the Child Protective Services Unit at DHR. During that telephone call Gouge discussed Mr. Wooten's visitation arrangement and he agreed to inquire about the case. Subsequently Gouge contacted caseworker Campbell and told her Mr. Wooten was concerned about the visitation arrangement. Gouge then asked her about the court order under which Daniel's case was proceeding. Afterwards, Gouge asked Respondent Wrights-Robinson, a "Foster Care Specialist" at DHR, to follow up on Mr. Wooten's request.

Wrights-Robinson swore in an affidavit given to support her Motion to Dismiss and/or Motion for Summary Judgment that she learned on November 20, 1990 Mr. Wooten had telephoned the state office regarding his visitation, and that she contacted Respondent Ormsby and passed along Mr. Wooten's request for increased visitation. Respondent Ormsby swears in her affidavit that on November 20, 1990 she spoke with Wrights-Robinson and Mr. Wooten regarding his request for unsupervised visitation. She further states she informed Mr. Wooten of her agreement with the present visitation plan, but that she would review the case.

The next day on November 21, 1990, DFACS caseworkers began to permit "unsupervised" visitation between Mr. Wooten and Daniel. This was done despite the sentiments of caseworker Hicks which were recorded in Daniel's DFACS case file *two days earlier:*

> C W [caseworker] is still not comfortable with what Mr. Wooten might do given ample

opportunity as far as absconding with child.

One week after the "unsupervised" visitation began, on November 28, 1990, Respondent Ormsby recorded in a November 28, 1990 summary of Daniel's case that:

> The agency still considers completely unsupervised visits *risky*. (emphasis supplied by Petitioner).

At no time did Petitioner consent to or approve of the "unsupervised" visitation which took place between Mr. Wooten and Daniel.

On January 31, 1991, caseworker Hicks asked caseworker Keating to pick Daniel up from day care for his scheduled visit with Mr. Wooten because Hicks had a doctor's appointment. Caseworker Keating complied with Hicks' request and brought Daniel to DFACS offices to meet Mr. Wooten. Despite the unresolved allegations pending against Mr. Wooten, prior abduction seven months earlier and recent psychological report from Daniel's therapist, Keating released Daniel into the "unsupervised" physical custody of Mr. Wooten with only instructions for him to return Daniel 2-1/2 hours later.

Mr. Wooten never returned Daniel.

After missing for about two months, law enforcement officials located Mr. Wooten and Daniel in a campground in Arizona, in a locked car with blankets covering the windows. After trying unsuccessfully for two hours to persuade Mr. Wooten to leave the car, officers began to enter the car. Mr. Wooten then shot Daniel in the head and committed suicide.

Several months later, the Forsyth County Child Fatality

Review Team completed its investigation into Daniel's death. Suggestions of all members of the Review Team included:

> Father's visits should have been under the supervision of DFCS previously ordered by the Court. If there is a discrepancy in the interpretation of "Supervised Visits", then that should be clarified.
>
> State office level DFCS should not make visitation/placement decisions or recommendations and/or pressure (indirectly or directly) local agency unless an official appeal is made to them in writing.

Because discovery depositions have not been permitted, Petitioner has not been able to learn who, why and how the state level DFACS employees pressured the local caseworkers in Daniel's case.

In Daniel's DFACS case file there is an entry that appears to be an admission by caseworker Hicks. The entry reads: "Ms. Hicks stated her office was receiving pressure from their state office to let Mr. Wooten have unsupervised visits and get this family into a more normal relationship." Additionally, in Daniel's file maintained by Respondent Gouge, there is a handwritten recording that appears to be an admission and acknowledgment by Gouge: "Father's visits with child should have been supervised by DFCS. This homicide could have been prevented if the visit was supervised." Again, since Petitioner has not been permitted to conduct any discovery depositions, she has been unable to investigate such issues as the contexts in which these entries were made, who from the state office was pressuring DFACS to provide "unsupervised" visitation, why state level personnel were interfering with and pressuring the county DFACS caseworkers to provide "unsupervised" visitation, etc.

Finally, Daniel's DFACS' case file disclosed the fact that caseworkers Hicks and Gilbert *specifically requested the Forsyth County Courts to order supervised* visitation between Mr. Wooten and Daniel *prior* to the January 31, 1991 abduction. These requests are perplexing since it was apparently understood that the juvenile court order awarded complete discretion in determining the methods of visitation between Mr. Wooten and Daniel. Perhaps discovery depositions would have revealed Hicks and Gilbert harbored the same concerns about "unsupervised" visitation as those expressed by Petitioner.

C. Proceedings Below

Petitioner Wooten filed her § 1983 and state law claims against Respondents Campbell, Gilbert, Hicks, Keating and Gaynor on August 27, 1992, and Respondents Greenwell, Lewallen, Gouge, Wrights-Robinson and Ormsby on January 29, 1993. Subject matter jurisdiction in the district court was pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1341, in that Petitioner's claims arise from and are authorized by 42 U.S.C. § 1983.

On November 5, 1992 and February 19, 1993, Respondents moved to dismiss Petitioner's action or alternatively for summary judgment.

On August 23, 1993, the district court *denied* Respondents' motion to dismiss and/or summary judgment Petitioner Wooten's § 1983 claims. Specifically, the district court concluded Wooten had indeed stated a claim under § 1983 upon which relief can be granted for violations of Daniel's Fourteenth Amendment substantive due process rights; the law supporting Wooten's § 1983 claims was clearly established, and a genuine issue of material fact exists on whether Respondents' conduct violated clearly established law. The district court granted Respondents'

motion in regard to Petitioner's state law wrongful death claims, and consolidated Petitioner's § 1983 cases. The district court also granted Respondents' request for leave to add the estate of Michael Wooten as a Third Party Defendant.

The Respondents appealed the district court's ruling.

On April 6, 1995, the Eleventh Circuit reversed the district court and held Petitioner's Complaint failed to state a claim upon which relief could be granted. Petitioner's Petition for Rehearing was denied on May 31, 1995. Petitioner now appeals the circuit court ruling.

To date, Petitioner has not been permitted to depose any of the Respondents to investigate Daniel's foster care placement, qualified immunity or any other issue, or to explore the inconsistencies and contradictions which exist between Daniel's DHR and DFACS case files prepared before this case was filed and the Respondents' affidavits which were prepared to support their motions to dismiss/summary judgment. The only discovery from the Respondents that Petitioner has been permitted to review are responses to the district court's mandatory interrogatories, Daniel's DFACS case file and the personal files of Respondents Gouge, Llewallen and Wrights-Robinson. The aforesaid documents and the testimony of Petitioner Wooten are the only sources of information Petitioner has to rely upon any response to Respondents' motions to dismiss/summary judgment.

REASONS FOR GRANTING THE WRIT

In the tragic case of *DeShaney v. Winnebago County Department of Social Services,*[1] the Court held that state

1. 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

caseworkers had no constitutional obligation to protect Joshua DeShaney from the dangers posed to him by his father, of which the caseworkers were well aware, because the state did not have custody of the boy. "It is the state's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the due process clause," not its failure to protect him from third party harm. *Id.* at 200.

Like Joshua, Daniel Wooten was harmed by his father. However, unlike Joshua's case, Daniel's harm took place while he was *within the custody* of the state. For the following reasons, a writ of certiorari should be issued for this case of first impression to the Supreme Court.

I.

"WHETHER THE STATE[2] HAS A CONSTITUTIONAL OBLIGATION TO PROTECT A CHILD IN ITS PHYSICAL AND LEGAL CUSTODY, WHOM IT SUBJECTS TO A STATE CREATED OR ENHANCED DANGER" IS AN IMPORTANT QUESTION WHICH HAS NOT BEEN, BUT MUST BE SETTLED BY THE SUPREME COURT.

On the day Daniel was abducted, caseworker Keating picked Daniel up from day care, brought him to DFACS' offices, and placed Daniel in the custody of Mr. Wooten without any protective supervision despite having knowledge of Mr. Wooten's prior abduction of Daniel seven months earlier, and the pending unresolved allegations of child abuse. Petitioner contends the State's legal and physical custody of Daniel

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2. As used here and throughout the Petition, "State" refers to DHR, DFACS, and state and local governmental entities and their agents.

imposed upon it a constitutional obligation to provide Daniel with protection. Petitioner further contends the State's action in creating or enhancing a danger specific to Daniel (placing him with Mr. Wooten without protective supervision) triggered a constitutional duty on its part to provide Daniel with protection from the state created or enhanced risks of harm which ultimately resulted.

DeShaney appears to acknowledge a state's constitutional obligation to protect its legal ward when the state itself engages in conduct that enhances or creates a risk of harm to its legal ward. (*See DeShaney* at 201, "While the state may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). The circuit courts do recognize state action may violate the Due Process Clause when it creates or enhances the risk of private harm to an individual within state custody. *See Cornelius v. Town of Highland Lake,* 880 F.2d 348 (11th Cir. 1989), *cert. denied,* 110 S. Ct. 1784 (1990); *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), *cert. denied,* 111 S. Ct. 341 (1990); *Jones v. Phyfer,* 761 F.2d 642 (11th Cir. 1985). *Cornelius* succinctly articulates the constitutional concept upon which Petitioner relies: "If the state puts a man in a position of danger and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Id.* at 354.

While the circuit courts recognize "state created or enhanced danger" as a basis for a Due Process violation, no uniform legal standards have been developed to guide the lower courts in reaching this determination. Instead, the courts now simply engage in *factual evaluations* as to whether "state created or enhanced dangers" exist, which arguably should be determined by juries. Because of the inconsistent approaches taken by the lower courts in determining whether a state may be

constitutionally obligated to protect an individual from danger when the state itself engaged in action that created or enhanced the risk of danger to said individual, the Court should intervene and provide an analysis of this question. The Supreme Court's resolution of this issue will clarify the legal boundaries which must be adhered to by states when they obtain custody of endangered children and harmonize lower court decisions which contain substantially similar factual patterns.

II.

"WHETHER THE STATE HAS A CONSTITUTIONAL OBLIGATION TO PROTECT A CHILD IN ITS CUSTODY, WHO IS PLACED BY THE STATE IN FOSTER CARE" IS AN IMPORTANT QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THE SUPREME COURT.

The Supreme Court has recognized the state has a constitutional obligation to provide for basic needs and to supply protection to persons in state custody, such as prisoners[3], arrestees[4], and involuntary committed patients[5]. Six years ago, Chief Justice Rehnquist opined in *DeShaney*[6] that a state's placement of a child in a "foster home operated by its agents" may be a "situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."[7]

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3. *Estelle v. Gamble*, 429 U.S. 97 (1976).

4. *Revere v. Massachusetts General Hosp.*, 463 U.S. 239 (1983).

5. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

6. 489 U.S. 189 (1989).

7. *DeShaney*, 109 S. Ct. at 1006 n. 9.

However, he expressed "no view on the validity of this analogy" since it was not presently before the Court.[8]

Daniel Wooten's case now places the foster care analogy before the Court for resolution.

On numerous occasions the circuit courts have addressed the constitutional duties owed by the state to a child in its custody, who has been placed in foster care. Four Circuits, including the Eleventh Circuit, have held that a state has an affirmative duty to protect a child its custody when the child is placed in a foster home and if the state fails to protect the child in its custody, the state deprives the child of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791, 795 (11th Cir. 1987) (*en banc*) *cert. denied,* 489 U.S. 1065 (1989); *e.g., K. H. Through Murphy v. Morgan,* 914 F.2d 846, 848-49 (7th Cir. 1990); *Doe v. New York City Department of Social Services,* 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied,* 464 U.S. 864 (1983); *Yvonne L. by and Through Lewis v. New Mexico Department of Human Services,* 959 F.2d 883, 893 (10th Cir. 1992); *see also Griffin v. Johnson,* 899 F.2d 1427, 1439 (5th Cir. 1990); *Lipscomb v. Simmons,* 884 F.2d 1242 (9th Cir. 1989); *Meador v. Cabinet for Human Resources,* 902 F.2d 474 (6th Cir. 1990). It has been further held, "[t]he state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to *ensure the continuing safety of that environment.* The state's failure to meet that obligation, . . . in the absence of overriding societal interests, constituted a deprivation of liberty under the Fourteenth Amendment." *Taylor* at 795.

Here, the facts are strikingly similar to those in *Taylor, Doe, K.H., and Yvonne.* The State obtained physical and legal custody

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8. *DeShaney,* 109 S. Ct. at 1006 n. 9.

of Daniel, placed him with its agent [Petitioner] in a foster home (albeit Petitioner's home), maintained foster care control and dominion, retained and exercised legal custody, and controlled Daniel's visitation with Mr. Wooten. Despite these facts, the circuit court unilaterally decided the state did not impose any limitation on Daniel's personal liberty or freedom to act, and had no affirmative duty to provide Daniel with protection. As a result, there is now a split of authority amongst the circuits, and within the Eleventh Circuit, in cases involving children within the state's custody who are placed by the state in foster care.

Because the Court has previously recognized the foster care issue as one in need of resolution[9], and there is now a split of authority among the circuit courts which have addressed foster care issues, the Court should grant Petitioner's request for certiorari. The resolution of this issue will ensure there is no confusion amongst state officials in regards to their constitutional duties owed to endangered children within state custody who are placed in foster care, and will provide the lower courts with a uniform analysis of issues which arise in foster care contexts.

III.

THE CIRCUIT COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

A. The Circuit Court Bases Its Decision Upon Factual Error.

In what appears to be an attempt to analyze Petitioner's § 1983 "state created or enhanced danger" claim, the circuit court

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9. *DeShaney*, 109 S. Ct. at 1006 n. 9.

concludes no "special relationship" existed between Daniel and Mr. Wooten, and it recites what it purports to believe are "facts" supporting its decision. First and foremost on its list is "Daniel was in the physical custody of his natural mother when his natural father took him."[10] This factual assertion is incorrect. Daniel was *not* in the physical custody of his natural mother when Mr. Wooten abducted him; instead, he was in the physical custody of caseworker Keating who had picked Daniel up from day care, brought him to DFACS' offices, and placed him in the "unsupervised" custody of Mr. Wooten.

Had the circuit court based its analysis upon facts within the record, it would have had no other choice but to conclude the custodial relationship with Daniel imposed upon caseworker Keating a constitutional obligation to protect him from a known risk of harm, Mr. Wooten. A contrary conclusion would be paramount to approving caseworker Keating's placement of Daniel alone with a known alleged pedophile, or Keating's placement of Daniel in a lion's den, without protection. In those instances, the Due Process Clause surely would not permit the state to absolve itself of responsibility simply because the harm was occasioned by a third party and while Daniel was outside the physical custody of the state employee.

Petitioner respectfully requests the Court to consider her § 1983 claims, and render a decision on the basis of *facts* contained within Daniel's DHR and DFACS case files.

B. The Circuit Court Resolves Disputed Issues of Material Fact Without Permitting Petitioner to Conduct Any Substantive Discovery.

The circuit court assumes the role of fact finder in its decision that Petitioner failed to state a § 1983 claim for relief.

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10. *Wooten v. Campbell*, 49 F.3d 696 (11th Cir. 1995).

While in this role, the circuit court ignores facts in Daniel's DHR and DFACS' case files which conclusively establish foster care placement which is analogous to *Taylor by and Through Walker v. Ledbetter*[11] (*see* facts cited within subsection B of Statement of Case).

Petitioner contends it is improper for the circuit court to interject itself as fact finder and then ignore facts which evidence Daniel's foster care placement and the state's control and dominion thereof. Further, Petitioner asserts she has a right to conduct discovery into any perceived factual issues prior to their resolution to ensure Petitioner's § 1983 claims are properly presented, heard and resolved. As the case presently stands, Petitioner has not been permitted to conduct any discovery depositions to investigate any factual issues pertinent to her § 1983 claims or to explore the inconsistencies and contradictions which exist between Daniel's DHR and DFACS case files prepared before the case was filed, and the Respondents' affidavits which were prepared to support their motions to dismiss/summary judgment.

Petitioner respectfully requests the Court to grant certiorari and remedy this situation.

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11. 818 F.2d 791, 795 (11th Cir. 1987) (*en banc*) *cert. denied*, 489 U.S. 1065 (1989).

CONCLUSION

For the aforesaid reasons, the Court's resolution of the questions presented for review is necessary and urgent, and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 29, 1995

APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 31, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9158

SYBILLE G. WOOTEN, Individually and as Administratix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

versus

CAROL CAMPBELL, Individually, NANCY P. GILBERT, Individually, RUTH Y. HICKS, Individually, PAT KEATING, Individually, JANE DOE, No. 1, Individually, JANE DOE, No. 2, Individually, JOHN DOE, No. 1, Individually JOHN DOE , No. 2, Individually, JOANNE GAYNOR,

Defendants-Appellants.

SYBILLE G. WOOTEN, Individually and as Administratix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

versus

DOUGLAS G. GREENWELL, JOHNNY V. LEWALLEN, GERALD V. GOUGE, BETTY WRIGHTS-ROBINSON, GAIL ORMSBY, John Doe No. 1, John Doe No. 2, Jane Doe No. 1, and Jane Doe No. 2,

Defendants-Appellants.

Appendix A

No. 93-9324

SYBILLE G. WOOTEN, Individually and as Administratix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

versus

CAROL CAMPBELL, Individually, NANCY P. GILBERT, Individually, RUTH Y. HICKS, Individually, PAT KEATING, Individually, JOANNE GAYNOR,

Defendants-Appellants,

JANE DOE, No. 1, Individually, JANE DOE, No. 2, Individually, JOHN DOE, No. 1, Individually, JOHN DOE, No. 2, Individually,

Defendants.

SYBILLE G. WOOTEN, Individually and as Aministratix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

versus

DOUGLAS G. GREENWELL, JOHNNY V. LEWALLEN, GERALD V. GOUGE, BETTY WRIGHTS-ROBINSON, GAIL ORMSBY,

Defendants-Appellants,

Appendix A

JANE DOE, No. 1, JANE DOE, No. 2, JOHN DOE, No. 1, JOHN DOE, No. 2,

Defendants.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellee, Sybille G. Wooten, is denied.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED APRIL 6, 1995

Sybille G. WOOTEN, Individually and as Administratrix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

v.

Carol CAMPBELL, Individually, Nancy P. Gilbert, Individually, Ruth Y. Hicks, Individually, Pat Keating, Individually, Jane Doe, No. 1, Individually, Jane Doe, No. 2, Individually, John Doe, No. 1, Individually, John Doe, No. 2, Individually, Joanne Gaynor,

Defendants-Appellants.

Sybille G. WOOTEN, Individually and as Administratrix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

v.

Douglas G. GREENWELL, Johnny V. Lewallen, Gerald V. Gouge, Betty Wrights-Robinson, Gail Ormsby, John Doe No. 1, John Doe No. 2, Jane Doe, No. 1, and Jane Doe No. 2,

Defendants-Appellants.

Sybille G. WOOTEN, Individually and as Administratrix of the Estate of Daniel M. Wooten, Plaintiff-Appellee,

v.

Appendix B

Carol CAMPBELL, Individually; Nancy P. Gilbert, Individually; Ruth Y. Hicks, Individually; Pat Keating, Individually; Joanne Gaynor,

Defendants-Appellants,

Jane Doe, No. 1, Individually; Jane Doe, No. 2, Individually; John Doe, No. 1, Individually; John Doe, No. 2, Individually,

Defendants.

Sybille G. WOOTEN, Individually and as Administratrix of the Estate of Daniel M. Wooten,

Plaintiff-Appellee,

v.

Douglas G. GREENWELL; Johnny V. Lewallen; Gerald V. Gouge; Betty Wrights-Robinson; Gail Ormsby,

Defendants-Appellants,

Jane Doe No. 1; Jane Doe No. 2; John Doe No. 1; John Doe No. 2,

Defendants.

Nos. 93-9158, 93-9324.

United States Court of Appeals,
Eleventh Circuit.

April 6, 1995.

* * *

Appendix B

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

DUBINA, Circuit Judge:

Appellants/defendants, officers and employees with the Georgia Department of Human Resources ("DHR"), and the Forsyth County Department of Family and Children Services ("DFACS"), appeal the district court's order denying their motion to dismiss or, in the alternative, motion for summary judgment. Defendants alleged in their motion and contend on appeal that the plaintiff/appellee, Sybille G. Wooten ("Wooten") fails to state a claim upon which relief can be granted and that the defendants are entitled to qualified immunity.[1] Because we hold that Wooten fails to establish the violation of a constitutional right, we reverse the order of the district court denying the defendants' motion to dismiss or, in the alternative, motion for summary judgment.[2]

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

1. Defendants also allege in their motion to dismiss that they are entitled to relief because the present litigation is barred by the "*Rooker-Feldman*" doctrine, *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); that Wooten's section 1983 claim is barred by the Eleventh Amendment; and Wooten's state tort claim is barred by sovereign immunity.

2. The district court erred in the first prong of its analysis and, therefore, we need not discuss the remaining defenses raised by the defendants. We note,

(Cont'd)

Appendix B

I. FACTS AND PROCEDURAL HISTORY

This is a tragic case. In June 1990, Wooten received a protective order from the Superior Court of Forsyth County, Georgia, giving her custody of her son, Daniel, and enjoining Daniel's father, Michael Wooten ("Michael") from coming within 500 yards of Wooten or Daniel. Shortly thereafter, Michael abducted Daniel from day care and a month later Michael was arrested for felony interference with custody. Upon notice from the Forsyth County Sheriff's Office, the county DFACS became involved in Daniel's case and petitioned the county Juvenile Court for temporary legal custody of Daniel.

In August 1990, the Juvenile Court gave custody of Daniel to the DHR acting through the DFACS and also gave the DHR authority to place Daniel. Both of Daniel's parents consented to this custody arrangement. The DHR and DFACS, after an investigation, placed Daniel in Wooten's home and allowed Michael to visit him once every two weeks under the supervision of DFACS caseworkers. Beginning in November 1990, the DHR and DFACS allowed Michael to have unsupervised visits with his son. During a January 31, 1991, unsupervised visit, Michael

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(Cont'd)

however, that *assuming arguendo* there is a violation of a constitutional right, the defendants are clearly entitled to qualified immunity. *See Spivey v. Elliott*, 41 F.3d 1497 (11th Cir. 1995); *Lassiter v. Alabama A & M University*, 28 F.3d 1146 (11th Cir. 1994) (en banc); *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991). Under the qualified immunity standards, Wooten fails to demonstrate that the defendants violated a clearly established right. It was not clearly established law then or now that these caseworkers could expect to be liable when a child, in their legal, but not their physical custody, is harmed by a natural parent while in the physical custody of the other natural parent. The district court's conclusion that the law is clearly established with regards to this matter relied upon cases dealing with foster care, not with a natural parent. We see a distinct difference in the two situations.

abducted Daniel. Nearly two months later, when police found Daniel and Michael, they discovered that Michael had shot and killed Daniel and then Michael had committed suicide.

Wooten brought this action under 42 U.S.C. § 1983 alleging that the defendants violated Daniel's constitutional rights under the Fourteenth Amendment Due Process Clause by failing to protect him from Michael. Wooten also asserted a state law claim for wrongful death. Wooten alleges that the defendants were reckless in granting Michael unsupervised visits when the evidence showed that Michael posed a significant risk of danger to Daniel. She also alleges that defendants of the state DHR interfered with the county DFACS's management of Daniel's case and required the DFACS to allow Michael to have unsupervised visits with Daniel. The defendants filed a motion to dismiss or, in the alternative, a motion for summary judgment asserting various grounds for entitlement to relief, including qualified immunity. The district court denied the motion, and the defendants appeal that order.

II. ANALYSIS

We note at this juncture that the Rule 12(b)(6) defense and the qualified immunity defense become intertwined. Under Rule 12(b)(6), the defendants can defeat Wooten's cause of action if her complaint fails "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Under the qualified immunity defense, the defendants are immune from liability if Wooten's complaint fails to state a violation of a "clearly established statutory or constitutional right[ ] of which a reasonable person would have known." *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). As the Supreme Court states, "[a] necessary concomitant to the

determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). Accordingly, we must first undertake an examination of Wooten's complaint to determine if she possesses a right subject to a constitutional violation. *Id.*[3]

The question we must resolve is whether a substantive due process right is implicated where a public agency is awarded legal custody of a child, but does not control that child's physical custody except to arrange court-ordered visitation with the non-custodial parent. The substantive component of the Due Process Clause protects only those rights which are fundamental. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995). Substantive due process rights are created only by the Constitution, not by state laws. *Id.* "A finding that a right merits substantive due process protection means that the right is protected 'against certain government actions regardless of the fairness of the procedures used to implement them.' " *Id.*

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3. Our court has not specifically stated which analysis comes first—the establishment of a violation of a constitutional right or the establishment of a violation of a 'clearly established' constitutional right (readily analogized to the question: which came first the chicken or the egg?). There are several cases in our circuit and in other circuits, however, which intimate that the first question to be answered in this analytical framework is whether the plaintiff establishes the violation of a constitutional right. *See, e.g., Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1586, 123 L.Ed.2d 153 (1993); *Burrell v. Board of Trustees of Georgia Military College*, 970 F.2d 785, 792 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1814, 123 L.Ed. 2d 445 (1993); *Sivard v. Pulaski Co.*, 17 F.3d 185 (7th Cir. 1994); *Johnston v. City of Houston*, 14 F.3d 1056 (5th Cir. 1994).

(quoting *Collins v. City of Harker Heights*, 503 U.S. 115, ___, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (internal quotations omitted)). Hence, tort law remains largely outside the scope of the substantive due process jurisprudence. *McKinney*, 20 F.3d at 1556.

The district court analogized this case to a foster care situation when it found that Wooten stated a claim for a violation of a constitutional right. This analysis is flawed in one major respect: Daniel was in the physical custody of his natural mother, not in a third-party foster home. Wooten maintained Daniel's clothes, food, and shelter. In a foster care situation, the state places the child, whether voluntarily or not, into the care of persons the state has chosen. These foster families provide for the child's physical needs on behalf of the state. The state exercises control and dominion over the child in a foster care situation and, accordingly, if a child is injured by a foster family, he or she has a section 1983 claim for a violation of a constitutional right. *See Taylor by and through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir.1987) (en banc), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 808 (1989).

The facts of this case are very similar to the facts in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In *DeShaney*, a minor child was severely beaten by his natural father despite knowledge by state social workers of the father's violent propensities. In rejecting the plaintiff's claims, the Supreme Court held:

> when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself,

> and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty— which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interest against harms inflicted by other means.

489 U.S. at 200, 109 S.Ct. at 1005-06 (citations omitted).

The Court also noted that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195, 109 S.Ct. at 1003. The purpose of the Due Process Clause is to protect the people from the State, not to ensure that the State protect the people from each other. *Id.* at 196,109 S.Ct. at 1003. "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. at 1004.

Appendix B

As in *DeShaney,* Michael was a private actor. Wooten had physical custody of Daniel and had consented to visits by Michael. Wooten took no legal action to prevent the unsupervised out of office visits nor the overnight visit at Michael's parents' home. R 4-7, Exh. 3 & 4. Wooten signed a case panel review which expressly stated that Michael would be allowed two hour visits away from the office. Id. After initially placing Daniel in Wooten's home, the state's only role was monitoring and arranging for the visitation between Daniel and Michael. Wooten maintained the control and dominion of Daniel and could have petitioned the court for a change in the custody and visitation arrangements if she felt Michael posed a risk to Daniel's well-being. Under these circumstances, allowing a child visitation with a natural parent does not so "shock the conscience" as to constitute a substantive due process violation. *DeShaney,* 489 U.S. at 197, 109 S.Ct. at 1004.

Wooten contends that the state and her son had a "special relationship" which imposed an affirmative duty on the state to provide Daniel with protection. *See Jones v. Phyfer,* 761 F.2d 642 (11th Cir. 1985); *Cornelius v. Town of Highland Lake,* 880 F.2d 348 (11th Cir. 1989), *cert. denied,* 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990).[4] In *Cornelius,* we held that "government officials may be held liable for the deprivation by a third party of a private citizen's due process rights when a special relationship is found to exist between the victim and the third party or between the victim and the government officials." 880 F.2d at 352,. There

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4. There is some question whether this court's holding in *Cornelius* survived the Supreme Court's decision in *Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), which held that a voluntary employment relationship, standing alone, does not impose a constitutional duty on government employers to provide a reasonably safe work environment. This panel, however, need not rely upon *Cornelius* in making its decision.

is no special relationship here: Daniel was in the physical custody of his natural mother when his natural father took him; Daniel did not rely solely upon the state for his physical needs and safety; Wooten had access to the courts if she was displeased with the unsupervised visitation; Wooten could have intervened to stop the unsupervised visitation; and Wooten was able to protect Daniel because she had physical custody of Daniel. As noted earlier, the state's sole responsibility was to monitor and arrange Daniel's visitation with Michael.

The Supreme Court has noted that in certain limited circumstances the Constitution imposes upon the state affirmative duties of care and protection with respect to particular individuals. In *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Court recognized that the Eighth Amendment's prohibition against cruel and unusual punishment requires the state to provide adequate medical care to incarcerated prisoners. The Court reasoned that because the prisoner is unable "by reason of the deprivation of his liberty" to care for himself, it is only fair that the state be required to care for him. *Id.* at 103-104, 97 S.Ct. at 290-91 (quotations omitted). In *Youngberg v. Romeo*, 457 U.S. 307,102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), the Court extended the *Estelle* analysis holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the state to provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others. 457 U.S. at 314-325, 102 S.Ct. at 2457-2463. These cases, however, provide no support for Wooten in the present case.

The state did not so restrain Daniel's freedom or hold him against his will to such an extent that a "special relationship" was created. The affirmative duty to protect arises from the limitation

which the state imposes on an individual's freedom to act on his own behalf. The state did not impose any limitation on Daniel's personal liberty or freedom to act. The state placed Daniel in the physical custody of his natural mother and monitored Daniel's visitation with his natural father. The state's obligation did not rise to the level of an affirmative duty to protect because the state did not restrain Daniel's liberty to the extent that it rendered him unable to care for himself. *DeShaney,* 489 U.S. at 200, 109 S.Ct. at 1005-06.

Several circuits have utilized *DeShaney* to find a distinction between situations where a child is totally dependent upon the state for security needs and situations where the primary responsibility for care remains with a natural parent. *See e.g., Maldonado v. Josey,* 975 F.2d 727 (10th Cir.1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993); *D.R. by L.R. v. Middle Bucks Area Vocational Tech School,* 972 F.2d 1364 (3rd Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993); *J.O. v. Alton Community Unit School Dist. 11,* 909 F.2d 267 (7th Cir.1990). Each of these cases involved children who were harmed by public school teachers. The plaintiffs in these cases attempted to hold school system officials liable based upon the custodial relationship which existed between the school system and the child, especially in light of state compulsory attendance laws. The courts uniformly held that substantive due process did not furnish the plaintiffs a basis to recover against the school systems because the state had not rendered the children totally dependent upon the state.[5]

The present case is similarly analogous to *DeShaney* and the

5. *See also Wright v. Lovin,* 32 F.3d 538 (11th Cir. 1994) (a child's voluntary school attendance did not create a custodial relationship between himself and the school sufficient to give rise to a constitutional duty of protection).

above-referenced cases to warrant our conclusion that Wooten has no claim under substantive due process. In those cases, like here, the children remained in the physical custody of their parents who were free to take steps to protect them from harms perpetrated by other persons. The key inquiry in this case is whether the county caseworkers controlled Daniel's life to such an extent that Wooten could not reasonably be expected to protect him. The answer is that they did not. Accordingly, Wooten's complaint fails to state a claim upon which relief can be granted and should have been dismissed.

III. CONCLUSION

We are not unsympathetic to Wooten and the tragic circumstances under which she lost her son. In applying the law, however, we cannot be guided by emotions. The facts of this case are similar to those in *DeShaney,* and it is under those principles that we hold that Wooten's complaint fails to state a violation of a constitutional right. We note that our decision does not foreclose other avenues of relief available to Wooten. We must remember that the individual truly responsible for this tragedy is Michael, not the state, for it was Michael who shot Daniel and then killed himself

REVERSED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED AUGUST 23, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION 1:92-cv-2047-MHS

SYBILLE G. WOOTEN

Plaintiff,

v.

CAROL CAMPBELL et al.,

Defendants

CIVIL ACTION 1:93-cv-218-MHS

SYBILLE G. WOOTEN

Plaintiff,

v.

DOUGLAS G. GREENWELL et al.,

Defendants

ORDER

These actions are before the Court on defendants' motions to

dismiss or, in the alternative, for summary judgment. Plaintiff's first action, *Wooten v. Campbell*, No. 1-92-cv-2047, is also before the Court on defendants' motion to add a third-party defendant. The Court's rulings are summarized below.

In March 1991, Daniel Wooten, a minor child, was killed by his father, Michael Wooten. Plaintiff Sybille Wooten is Daniel's mother, who at the time was married to Michael Wooten. Defendants are officers and employees of the Georgia Department of Human Resources ("DHR") and the Forsyth County Department of Family and Children Services ("DFACS").

In June 1990, plaintiff was granted a protective order from the Superior Court of Forsyth County, Georgia, giving her custody of Daniel and enjoining Daniel's father from coming within five hundred yards of plaintiff or Daniel. Shortly thereafter, Daniel's father abducted him from day care and a month later was arrested for felony interference with custody. Upon notice from the Forsyth County Sheriff's Office, the county DFACS became involved in Daniel's case and petitioned the county Juvenile Court for temporary legal custody of Daniel.

In August 1990, the Juvenile Court gave custody of Daniel to the DHR acting through the DFACS and also gave the DHR authority to place Daniel. Both of Daniel's parents consented to this custody arrangement. The DHR and DFACS then placed Daniel in his mother's home and allowed Daniel's father to visit him once every two weeks under the supervision of DFACS caseworkers. Beginning in November 1990, the DHR and DFACS allowed Daniel's father to have unsupervised visits with his son. During the January 31, 1991 unsupervised visit, Daniel's father abducted him. Nearly two months late, Daniel's father shot and killed Daniel and then himself.

Appendix C

Plaintiff brought these actions under 42 U.S.C. § 1983, alleging that defendants violated Daniel's constitutional rights under the Fourteenth Amendment Due Process Clause by failing to protect him from his father. Plaintiff also asserted a supplemental state claim for wrongful death against defendants. Plaintiff alleges that defendants wrongly granted Daniel's father unsupervised visits with him when the evidence showed that a significant risk of danger existed. Plaintiff also alleges that defendants of the state DHR interfered with the county DFACS's management of Daniel's case and required the DFACS to allow Daniel's father to have unsupervised visits with him. Plaintiff did not sue the State of Georgia, the DHR, or the county DFACS.

Defendants in both actions have moved to dismiss or, in the alternative, for summary judgment on several grounds: (1) plaintiff has failed to state a claim upon which relief can be granted; (2) defendants are insulated by qualified immunity; (3) the present litigation is barred by the *Rooker-Feldman* doctrine; (4) plaintiff's § 1983 claim is barred by the Eleventh Amendment; and (5) plaintiff's state tort claim is barred by sovereign immunity. In both actions, the Court has limited discovery to the issue of qualified immunity. The Court now addresses each of defendants' arguments.

I. QUALIFIED IMMUNITY

The Court first addresses defendants' claims that they are immune from plaintiff's actions and concludes that defendants do not have qualified immunity from these actions.

A. *Standard for Qualified Immunity*

"[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus,

> [c]ourts evaluate the official's conduct under an objective, reasonable person standard; the relevant question on a motion for summary judgment based on a defense of qualified immunity is whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred.

Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1503 (citing *Anderson v. Creighton*, 483 U.S. 635, 642 (1987)). Qualified immunity usually protects all but the plainly incompetent or those who knowingly violate the law. *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The Eleventh Circuit follows a two-part analysis for determining whether an official is protected by qualified immunity, the second part of which is further divided into two subparts. *Courson v. McMillian*, 939 F.2d 1479, 1487-88 (11th Cir. 1991). First, the defendant-official must prove that she was acting within the scope of her discretionary authority when the allegedly wrongful acts occurred. *Id.* at 1487. Second, once the defendant-official has satisfied this burden, the burden shifts to the plaintiff to show that the defendant-official lacked good faith, that is, that the defendant-official's actions violated clearly established law.

In the good faith analysis, the court must first determine

whether the law was clearly established when the governmental action in question occurred, that is, the contours of the right must be sufficiently clear that a reasonable official must understand that what she is doing violates that right. *Id.* at 1487-88. Then the court must determine if a genuine issue of fact exists on whether the defendant-official's conduct violated clearly established law. *Id.* While a court must examine the information possessed by the defendant-official at the time of her conduct, the court must not inquire into the defendant-official's subjective intent. *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). Rather, the relevant question is the objective, albeit fact-specific, question whether a reasonable government official could have believed that her conduct was lawful in light of clearly established law and the information possessed. *Id.*

B. *Applying the Standard*

1. *Clearly Established Law*

The Court concludes that the law supporting plaintiff's § 1983 claim was clearly established at the time of defendants' actions in 1990 and 1991.[1] The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment[2] imposes upon

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1. Applying the qualified immunity standard to the facts in these actions, the Court concludes that no genuine issue of material fact exists on whether defendants were acting within the scope of their authority as officers and employees of the DHR and DFACS when they allowed Daniel's father to have unsupervised visits with his son or when the DHR allegedly interfered with the DFACS's management of Daniel's case. *See infra* note 8.

2. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. In this context, the Court is concerned with Daniel's substantive, not procedural, due process rights.

the State affirmative duties of care and protection of certain individuals in certain limited circumstances. *E.g., City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983) (State must provide medical care to suspects in police custody); *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982) (State must provide involuntarily committed mental patients with services necessary to ensure their reasonable safety); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (State must provide adequate medical care to incarcerated prisoners).

While the Supreme Court has not held that a State has an affirmative duty to protect a child in its custody,[3] *see DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 201 n.9 (1989), four circuits, including the Eleventh Circuit, have held that a State has an affirmative duty to protect a child in its custody when the child is placed in a foster home and that if the State fails to protect the child in its custody, in the absence of overriding State interests, the State deprives the child of a liberty interest under the Fourteenth Amendment. *Taylor by and Through Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989); *e.g., K.H. Through Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990); *Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983). Indeed, in a post-*DeShaney* case, the Tenth Circuit has held that, for purposes of qualified immunity, the law is clearly established that a State has an affirmative duty to protect a child once the State takes custody of the child and places him in a foster home. *Yvonne L. by and Through Lewis v. New Mexico Dept. of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992). For these reasons, the Court concludes

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3. The Supreme Court need not address a right for the right to be clearly established law for purposes of qualified immunity. *Benson v. Allphin*, 786 F.2d 268, 275 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986).

that the law supporting plaintiff's § 1983 claim was clearly established in 1990 and 1991 when the events here occurred.

Defendants object, arguing that, under *DeShaney,* they are entitled to qualified immunity. The Court disagrees. In *DeShaney,* 489 U.S. at 189, the Supreme Court held that the Fourteenth Amendment does not impose upon the State an affirmative duty to protect a child against private violence from his father. *Id.* at 202. The facts of *DeShaney* are distinguishable from the facts here. There a father who had custody of his son beat his son so severely that the boy was left mentally impaired. *Id.* at 193. While state social workers and local officials knew of the danger to the child, they never had custody of the child and thus had no affirmative duty to protect him from his father. The Court reasoned that Wisconsin had not restrained the child's individual freedom to act on his own behalf and therefore the child's rights were not infringed under the Due Process Clause. *Id.* By contrast, a juvenile court of Georgia gave the DHR and DFACS physical and legal custody of Daniel, and the DHR and DFACS took custody of Daniel, placed him in a foster home (albeit his mother's home), retained legal custody over him, and allowed his father to have unsupervised visits with him.

More important, *DeShaney* is consistent with the Court's conclusion that the DHR and DFACS had an affirmative duty to protect Daniel. In *DeShaney,* the Court stated that determining whether a State has an affirmative duty to protect an individual turns not on whether the State knew of the individual's predicament or expressed its intent to protect the individual but on whether the State has imposed a significant limitation on the individual's freedom to act on his own behalf. 489 U.S. at 200. "[I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration,

institutionalization, or other similar restraining of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause . . . ." *Id.* By taking Daniel into their custody, the DHR and DFACS so restrained his freedom to act on his own behalf that the protections of the Due Process Clause were triggered and the DFACS had an affirmative duty to protect Daniel.

Finally, the Court in *DeShaney* stated that it did not reach the issue addressed here, whether a State has an affirmative duty when the State takes custody of a child and places the child in a foster home. *Id.* at 201 n.9. Still, the Court allowed that such a situation might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect" and noted that several circuits had so held. *Id.*

Defendants next argue that if the law is clearly established that a State has an affirmative duty to protect a child in its custody in a foster home, this law does not apply because Daniel was harmed outside his foster home, that is, outside the custody of the DHR and DFACS. The Court disagrees. In *Taylor,* 818 F.2d at 791, the State took custody of the child and placed him in a foster home where he was abused.[4] There the court held that "[t]he state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment. The state's failure to meet that obligation, . . . in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment." *Id.* at 795. While the DHR and DFACS placed Daniel in his mother's home rather than in a foster home, the DHR and DFACS retained legal custody of Daniel and

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4. The Court acknowledges that *Taylor* is a pre-*DeShaney* case.

controlled Daniel's father's visits, choosing to allow Daniel's father to have unsupervised visits with his son. Accordingly, the Court finds these facts analogous to those in Taylor and concludes that by taking Daniel into its custody and controlling his visits with his father, the DHR and DFACS created a special custodial relationship with Daniel and therefore could be liable for violating his due process rights by putting him in a position of danger from a private person and failing to protect him. Having concluded that the law supporting plaintiff's § 1983 claim is clearly established, the Court must next decide whether an issue of fact exists on whether defendants' conduct violated clearly established law.

2. *Violation of Clearly Established Law*

The Court concludes that a genuine issue of material fact exists on whether defendants' conduct violated clearly established law. Without considering defendants' subjective intent, the Court must consider the information defendants possessed when they allowed Daniel's father to have unsupervised visits with Daniel. The Court must then ask whether a reasonable government official in defendants' position could have believed that her conduct was lawful in light of clearly established law.

From July 1990 until January 1991, when Daniel was abducted, the DHR and DFACS possessed certain knowledge about Daniel's case. Defendants knew that Daniel's father had accused plaintiff of abusing Daniel. Defendants knew of certain allegations against Daniel's father: that he had physically abused Daniel; that he had sexually abused Daniel; that he had exposed Daniel to sexually explicit materials; that he had slept in a locked bedroom with Daniel for two months; that he had taken nude

photos of Daniel against Daniel's will; that he had raped plaintiff; and that he had strangled plaintiff. (Pl.'s Resp. Defs.' Mot. Dismiss/Summ. J. at 7-8.[5]) Defendants also knew that Michael Wooten was allegedly an alcoholic. Finally, defendants knew that Daniel's father had once abducted him from day care in June 1990, when plaintiff had custody of her son. (*Id.* at 5.)

Next the Court must ask, without considering defendants' subjective intent, whether a reasonable person in defendants' position could have believed that her conduct was lawful in light of clearly established law and the information possessed. The Court concludes that a genuine issue of material fact exists on whether a reasonable government official who had custody of Daniel could have believed that her conduct — allowing Daniel's father to have unsupervised visits with his son — was lawful in light of the information defendants possessed since allowing unsupervised visits could have placed Daniel in a position of danger. Because a genuine issue of material fact exists on whether defendants' conduct violated clearly established law, defendants are not entitled to qualified immunity from these actions.

II. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants also move the Court to dismiss these actions because plaintiff has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Motions to dismiss for failure to state a claim are not favored and are rarely granted since they test the sufficiency of the complaint; few complaints fail to meet the standard of a generalized statement of facts to which defendant can respond. *Rothner v. City of Chicago*, 929 F.2d 297,

5. *Wooten v. Greenwell*, No. 1:93-cv-218.

302 (7th Cir. 1991); *see Garita Hotel, Ltd. v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992).

Again, defendants argue that plaintiff has failed to state a claim upon which relief can be granted because *Taylor*, 818 F.2d at 791, is inapposite and because the holding in *DeShaney*, 489 U.S. at 189, is controlling. As noted above, the Court concludes that the facts of this action are analogous to the facts in *Taylor* and are distinguishable from the facts in *DeShaney*. Therefore, plaintiff has stated a claim upon which relief can be granted for violation of Daniel's Fourteenth Amendment substantive due process rights under § 1983.

In the alternative, defendants argue for summary judgment on the same grounds. While the Court can convert a motion to dismiss for failure to state a claim upon which relief can be granted into a motion for summary judgment under Rule 56, Fed. R. Civ. P. 12(b), the Court declines to do so in this action because discovery has thus far been limited to the issue of qualified immunity. Therefore, the Court denies defendants' motion for summary judgment.

III. *ROOKER-FELDMAN* DOCTRINE

Defendants next argue that plaintiff's complaint is a collateral attack on a child custody decision that was resolved by the juvenile courts of the State of Georgia and therefore is barred under the *Rooker-Feldman* doctrine. Defendants claim that plaintiff asks the Court to exercise appellate jurisdiction over the state courts of Georgia. The Court disagrees.

Under the *Rooker-Feldman* doctrine, lower federal courts have no power to sit in direct review of state court decisions, and

parties adversely affected by a state court's decision must vindicate their rights in the state appellate courts. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415-16 (1923). The doctrine prohibits lower federal courts from addressing issues that are "inextricably intertwined" with the state court's adjudication of a claim. *Id.*

Here plaintiff's complaint does not challenge the constitutionality of the Forsyth County Juvenile Court's Order of August 7, 1990, which gave custody of Daniel to the DHR and the DFACS. Instead, plaintiff seeks damages under § 1983 for the infringement of Daniel's Fourteenth Amendment rights under the substantive Due Process Clause for defendants' failure to protect Daniel when he was in their custody. Indeed, the constitutional harm alleged by plaintiff did not arise until March 24, 1991, when Daniel's father murdered him, after the county juvenile court's order. On these facts, the *Rooker-Feldman* doctrine has no application, and the Court declines to dismiss plaintiff's actions for this reason.

IV. ELEVENTH AMENDMENT IMMUNITY

Defendants also argue that plaintiff's action is barred by the Eleventh Amendment since plaintiff seeks to recover damages from the State of Georgia's self-insurance fund. The Court concludes that because plaintiff seeks to impose individual and personal liability upon defendants, the Eleventh Amendment is inapplicable here.

The Eleventh Amendment bars actions in federal court "by private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan,* 415

U.S. 651, 663 (1974). Thus, if a plaintiff seeks damages from the public treasury of a state in federal court, the Eleventh Amendment bars the claim. If, however, a plaintiff seeks to impose individual and personal liability against state officials or employees and does not seek funds in a State's treasury, the Eleventh Amendment does not bar the claim. *Hafer v. Melo,* 112 S. Ct. 358, 364 (1991); *Scheuer v. Rhodes,* 416 U.S. 232, 237-38 (1974). To determine whether a defendant is sued officially or personally, the Court must consider the nature of the liability sought during the course of proceedings. *Lundgreen v. McDaniel,* 814 F.2d 600, 604 (11th Cir. 1987). A plaintiff's complaint need not specify whether defendants are being sued personally, in their individual capacities, or both. *Id.*

Here plaintiff's complaints bring suit against the defendants as individuals, not against the State of Georgia, the DHR, or the DFACS. In *Wooten v. Campbell,* No. 1:92-cv-2047, plaintiff's prayer for relief seeks damages from defendants "jointly and severally." (Pl.'s Compl.) In *Wooten v. Greenwell,* No. 1:93-cv-218, plaintiff seeks damages from defendants "in their individual capacities." (Pl.'s Compl. at 10.) The essence of plaintiff's action then is that defendants should be individually and personally liable for their failure to protect Daniel from his father's violence. On these facts, the Court is satisfied that plaintiff seeks judgments against defendants in their individual and personal capacities, not in their official capacities. Therefore, under *Hafer,* the Eleventh Amendment does not bar this action against defendants.

V. PLAINTIFF'S SUPPLEMENTAL WRONGFUL DEATH CLAIM

Finally, defendants argue that the Court should dismiss

plaintiff's wrongful death claim brought under state law.[6] Because different legal standards apply to the state DHR and the county DFACS, the Court concludes that only the state DHR defendants are immune from plaintiff's state law tort claim.

Defendants first argue that the Court should not exercise supplemental jurisdiction over plaintiff's state tort claim. Under 28 U.S.C. § 1367, federal district courts have supplemental jurisdiction over all other claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The Court is satisfied that plaintiff's wrongful death state tort claim against defendants is so related to plaintiff's § 1983 claim that the two claims form part of the same case or controversy. Therefore, the Court declines to dismiss plaintiff's state law claim for this reason.

Defendants next argue that the Court should dismiss plaintiff's state law tort claim because, under Georgia law, plaintiff is barred from bringing her state tort claim against defendants. Under the Georgia Tort Claims Act, O.C.G.A. §§ 50-21-2 to -35 (Supp. 1993), a state officer or employee who commits a tort while acting within the scope of her official duties or employment is immune from suit. *Id.* § 50-21-25(a). Still, a plaintiff may recover damages for the officer or employee's tort from the State itself because the State has waived its sovereign immunity for actions brought in state courts.[7] *Id.* § 50-21-23(a)-

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6. Since plaintiff's wrongful death tort claim against defendants is an issue of substantive state law, the Court must apply Georgia law to this claim. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Georgia courts recognize a tort action for the wrongful death of a child. O.C.G.A. § 51-4-4 (1982).

7. The State of Georgia has not waived its Eleventh Amendment immunity for actions brought in federal court. O.C.G.A. § 50-21-23(b).

(b). To recover, then, a plaintiff must bring her state law tort action in the state courts, but must name not the individual officer or employee but the state government entity as the party defendant. *Id.* § 50-21-23(b), -25(b). Nonetheless, a plaintiff can recover only for the torts of "State" officers and employees, and "State" does not include "counties, municipalities, school districts, other units of local government, hospital authorities, or housing and other local authorities." *Id.* § 50-21-22(5), (7).

Applying the Tort Claims Act to these facts, the Court concludes that the Act protects the state DHR defendants from plaintiff's state law tort claim, but does not protect the county DFACS defendants from plaintiff's claim. Georgia law requires plaintiff to bring her state law tort action against the state DHR defendants in the state courts and to name the DHR as the party defendant, and this Court may not create a right where none exists in state law. Plaintiff then may not recover on her state law tort claim against these defendants since, under the Act, they are immune from plaintiff's claim.[8] Therefore, the Court dismisses plaintiff's wrongful death claim against the state DHR defendants.[9]

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8. Presumably, plaintiff could sue these defendants in their individual and personal capacities in state or federal court for the tort of wrongful death if defendants had acted outside the scope of their employment. The parties, however, do not contest, and no evidence shows, that these defendants acted within the scope of their employment when they allowed Daniel's father to have unsupervised visits with his son. Neither party has contested that the state DHR defendants were acting within the scope of their employment. The state DHR is an institution of the State of Georgia that has the power to accept for casework services and care all children and youths placed in the legal custody of the DHR by Georgia courts. O.C.G.A. §§ 49-2-5, 49-5-8 (1990 & Supp. 1993).

9. *Wooten v. Greenwell*, No. 1:93-cv-218.

Appendix C

VI. DEFENDANTS' MOTION TO ADD THIRD-PARTY DEFENDANT

Defendants in the action *Wooten v. Campbell,* No. 1:92-cv-2047, move the Court to add the Estate of Michael David Wooten as a third-party defendant to this action. The Court grants defendants' unopposed motion.

Under Federal Rule of Civil Procedure 14, a defending party may implead a third-party defendant when the third-party defendant may be liable to the defending party for all or part of the plaintiff's claim against the party. Fed. R. Civ. P. 14(a). A defending party may assert a third-party claim when the third-party defendant's liability is dependent on the outcome of the main claim or when the third-party defendant may be secondarily liable to the defendant. *See Southeast Mortgage Co. v. Mullins,* 514 F.2d 747, 749 (5th Cir. 1975).[10] Also, the defendant's right to relief must exist under the applicable substantive law. *See Kim v. Fujikawa,* 871 F.2d 1427 (9th Cir. 1989).

Since defendants argue that Michael Wooten was the proximate cause of Daniel's death, Michael Wooten's Estate could be liable to defendants for all or part of plaintiff's claim against them. Thus, the Estate's liability depends on the outcome of plaintiff's claims that defendants were the proximate cause of Daniel's death. On plaintiff's state tort law claim, Georgia law recognizes a right of contribution for joint tortfeasors. O.C.G.A. § 51-12-32 (1982); *Evans v. Lukas,* 140 Ga. App. 182 (1976). For these reasons, the Court grants the motion of defendants in *Wooten v. Campbell,* No. 1:92-cv-2047, to add the Estate of Michael Wooten as a third-party defendant.

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10. In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all cases decided by the Fifth Circuit before September 30, 1981.

Appendix C

VII. CONSOLIDATION OF CASES

In the interest of judicial convenience and economy and after concluding that these actions present common issues of law and fact, the Court sua sponte consolidates these two actions for trial. Fed. R. Civ. P. 42(a). Consolidation "does not merge the suits into a single suit, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933). *See generally* Charles A. Wright & Arthur R. Miller, 9 *Federal Practice and Procedure* §§ 2381-86, at 252-76 (1971 & Supp. 1999).

VIII. CONCLUSION

The Court's rulings are summarized as follows:

A. In *Wooten v. Campbell*, No. 1:92-cv-2047, the Court DENIES defendants' motion to dismiss or, in the alternative, for summary judgment [##14-1, 14-2].

B. In the action *Wooten v. Greenwell*, No. 1:93-cv-218, the Court GRANTS IN PART and DENIES IN PART defendants' motion to dismiss or, in the alternative, for summary judgment [##8-1, 8-2]. The Court dismisses plaintiff's wrongful death claim against defendants in this action.

C. In the action *Wooten v. Campbell*, No. 1:92-cv-2047, the Court GRANTS defendants' motion to add the Estate of Michael Wooten as a third-party defendant in this action [#15-1].

Appendix C

D. Finally, the Court DIRECTS the Clerk to consolidate these actions.

IT IS SO ORDERED, this 19th day of August, 1993.

s/ Marvin H. Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia